

memorandum

CC:INTL-0575-89

Brl:WEWilliams

Date

AUG 25 1989

TO: District Director, Manhattan

Attn: Mr. Stuart A. Mann E:E:9:1916:SAM

FROM: Chief, Branch No. 1

Associate Chief Counsel (International) CC:INTL:1

SUBJECT: I.R.C. §§ 897 and 1445

This refers to your undated memorandum that was received in this office on August 4, 1989. You request our views on two questions additional to those that we responded to in a memorandum dated July 10, 1989. We treated the earlier memorandum as a response to a request for informal technical advice and will do the same with this request. Your inquiries concern I.R.C. §§ 897 and 1445.

The issues on which you request our views are as follows:

1. Does the phrase "payment of any tax due" in section 1.1445-1(e)(3) of the Treasury Regulations refer to the amount of tax actually due or the amount of tax shown as due on the return filed by transferors of U.S. real property interests? 1445.01-00.

2. What is the statute of limitations for assessment of transferee liability under section 1445? 1445.01-00.

The facts are stated in our memorandum to you dated July 10, 1989, and we will not repeat them here.

Issue 1

Under section 897(a), a nonresident alien individual or a foreign corporation's gain or loss from the disposition of a U.S. real property interest, defined in section 897(c), is taxed "as if the taxpayer were engaged in a trade or business within the U.S. during the taxable year and as if such gain or loss were effectively connected with such trade or business."

Section 1445(a), subject to five enumerated exemptions, imposes a withholding obligation on a transferee, whether domestic or foreign, of a U.S. real property interest that is acquired from a foreign person. In certain limited circumstances, the withholding obligation may be imposed on an agent of the transferor or transferee.

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Section 1.1445-1(e)(1) of the Regulations states as follows:

Every person required to deduct and withhold tax under section 1445 is made liable for that tax by section 1461. Therefore, a person that is required to deduct and withhold tax but fails to do so may be held liable for the payment of the tax and any applicable penalties and interest.

Section 1.1445-1(e)(2) of the Regulations provides in part that

if a transferee is required to deduct and withhold tax under section 1445 but fails to do so, then the tax shall be assessed against and collected from that transferee. Such person may also be subject to any of the civil and criminal penalties that apply. Corporate officers or other responsible persons may be subject to a civil penalty under section 6672 equal to the amount that should have been withheld and paid over.

However, if a transferee had a withholding responsibility under section 1445, but fails to withhold and the tax liability is satisfied by

(A) The transferor's filing of an income tax return (and payment of any tax due) with respect to the transfer,

* * *

the tax required to be withheld under section 1445 shall not be collected from the transferee. Such transferee's liability for tax ... shall be deemed to have been satisfied as of the date on which the transferor's income tax return was filed or the withholding certificate was issued. No penalty shall be imposed on or collected from such person for failure to return or pay the tax, unless such failure was fraudulent and for the purpose of evading payment. [Emphasis added.]

We think that the only reasonable interpretation of the phrase "and payment of any tax due" is that the transferee must withhold "10 percent from the amount realized by the transferor foreign person (or a lesser amount established by agreement with the Internal Revenue Service)" (Treas. Reg. § 1.1445-1(a)) but that this withholding obligation is eliminated if the transferor files the required income tax return and pays the tax due under section 871(b)(1) or 882(a)(1). Otherwise the withholding obligation remains in effect.

Our interpretation is supported by language in the General Explanation of the Tax Reform Act of 1984, prepared by the

Staff of the Joint Committee on Taxation, H.R. 4170, 98th Cong. 407 (Dec. 31, 1984), states that the withholding system

should result ... in a withholding tax liability that approximates the final tax liability of a foreign seller more closely than might have been the case under earlier withholding proposals. [Emphasis added.]

The same report states, at page 409 and in connection with the provision allowing the IRS to agree to a reduction of the amount to be withheld, that

[t]he Act also authorizes the Internal Revenue Service to reduce withholding if the Service determines that such a reduction will not jeopardize the collection of the U.S. tax for which the transferor is ultimately liable. A request for reduced withholding may be made by either the transferor or the transferee. [Emphasis added.]

We have found no authority for a proposition that the obligation of the transferee to withhold is eliminated by the transferor's payment of the tax reported on its return regardless of whether this tax is the transferor's correct final tax liability.

Issue 2

Your second question requests our views on the statute of limitations on a transferee's liability under section 1445.

Section 1.1445-1(c)(1) of the Regulations provides as follows:

A transferee must report and pay over any tax withheld by the 20th day after the date of the transfer. Forms 8288 and 8288-A are used for this purpose, and must be filed with the Internal Revenue Service Center, Philadelphia, PA 19255. Pursuant to section 7502 and regulations thereunder, the timely mailing of Forms 8288 [U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests] and 8288-A [Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests] will be treated as their timely filing. Form 8288-A will be stamped by the IRS to show receipt, and a stamped copy will be mailed by the IRS to the transferor (at the address on the form) for the transferor's use.

I.R.C. § 6501(a) states the general rule that, except as otherwise provided, the amount of any tax imposed by Title 26 shall be assessed within 3 years after the return was filed

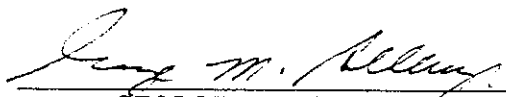
(whether or not such return was filed on or after the date prescribed). One exception from the general rule is in section 6501(b)(2) for certain employment taxes and tax imposed by chapter 3. Sections 1445 and 1461 are found in chapter 3.

Section 6501(b)(2) states that

if a return of tax imposed by chapter 3 ... for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

Therefore, it is our view that there is a 3-year statute of limitations with respect to IRS determination of a deficiency in withholding under sections 1445 and 1461; and that this period of limitations begins to run on April 15th of the year subsequent to the year in which a transferee files a Form 8288 reporting and paying over withheld tax on a sale of a U.S. real property interest. In the case of a withholding agent's failure to file a Form 8288, section 6501(c)(3) applies, and "the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

If you have any additional questions or if we can be of assistance in this matter, please call Ed Williams at 287-4851.



GEORGE M. SELLINGER